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91-165

Supreme Court, U.S.
FILED
JUN 18 1991
OFFICE OF THE CLERK

No._____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1991

WALLACE LIN,
Petitioner
v.
PRUDENTIAL-BACHE SECURITIES, INC., et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

WALLACE LIN, *pro se*
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Sunnyvale, CA 94086
(408) 720-8002

QUESTION PRESENTED

Whether dismissal of complaint without pretrial discovery and opportunity for amendment and with prejudice was proper when plaintiff-petitioner sufficiently alleged respondents' violation of Constitutional, civil and federal statutory rights that were peculiarly within respondents' knowledge, and there was no determination that petitioner could prove no set of facts entitling him to relief?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Wallace Lin and the respondents Prudential-Bache Securities Inc, George Ball, Kevin Hoffman, Eugene Stansbery, Carrington Clark Jr., ("PRUDENTIAL defendants"), the New York Stock Exchange ("NYSE") and fifty DOEs.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner Wallace Lin respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on March 20, 1991.

OPINIONS BELOW

The Memorandum decision of the Court of Appeals for the Ninth Circuit was ordered not published, and is reprinted in the APPENDIX hereto, p.1a, *infra*.

The Order of the United States District Court for the Northern District of California (Ingram, D.J.) is reprinted in the APPENDIX hereto, p. 10a , *infra*.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. 1331, 28 U.S.C. 1343; RICO Act, 18 U.S.C. 1961 *et seq.*; Clayton Act, 15 U.S.C. 15; Civil Rights Act, 42 U.S.C. 1981, 42 U.S.C. 1985(2) and (3), 42 U.S.C. 1986; and the U.S. Constitution; petitioner brought this suit in the Northern District of California. Without pretrial discovery, opportunity for amendment of complaint, or hearing, the Northern District dismissed the suit . See APPENDIX, p.10a, *infra*.

On petitioner's appeal, the Ninth Circuit on March 20, 1991 entered a judgment and memorandum, which was ordered not to be published, affirming dismissal. No petition for rehearing was sought.

This petition for writ of certiorari was timely filed by mailing via U.S. postal service on June 18, 1991. The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

In 1984, while employed by Merrill Lynch, Pierce, Fenner & Smith, Inc. ("MERRILL"), petitioner Wallace Lin ("LIN") was persuaded by respondents Carrington Clark Jr. ("CLARK"), a Vice President and the Northwest Regional Director of Prudential-Bache Securities, Inc. ("PRUDENTIAL") and Eugene Stansbery ("STANSBERY"), the manager of PRUDENTIAL's San Jose, California office, to leave MERRILL to work for PRUDENTIAL.

The terms of employment were detailed and memorialized in a letter contract dated July 20, 1984 ("July contract") which contained a confidentiality clause but no arbitration clause.

On August 20, 1984, STANSBERY and respondent Kevin Hoffman ("HOFFMAN"), PRUDENTIAL's in-house counsel, rushed LIN into signing a host of documents which LIN was told were routine and would not in any way compromise his rights under the confidential July contract. One such document was dated August 20, 1984 entitled "Employment Agreement" ("August document") which STANSBERY and HOFFMAN insisted was a dummy document without any legal effect, but useful and necessary to protect the confidentiality of the July contract. In reliance of such representations and under pressure to be cooperative, Lin signed.

Thereafter, PRUDENTIAL defendants did faithfully follow its confidential July contract with LIN, as expected, rather than the sharply different August document. The conduct of PRUDENTIAL defendants thus unequivocally proved the sole validity of the July contract and the prior understanding of the parties in that regard.

However, after LIN discovered and repeatedly objected to PRUDENTIAL's artificial loss creation in customer accounts to benefit PRUDENTIAL's own in-house trading accounts. PRUDENTIAL retaliated by systematically breaching LIN's July contract, prohibiting LIN from continuing his successful prospecting of

corporations and other major executive accounts, and drastically cutting his pay by 90%, thereby forcing LIN to resign.

In anticipation of LIN's wrongful termination suit, HOFFMAN warned of NYSE retaliation and employment blacklisting should LIN sue a prominent NYSE member such as PRUDENTIAL. He further warned that George Ball ("BALL", then CEO of PRUDENTIAL), through his close friend John Shad (then Chairman of the Securities & Exchange Commission ("SEC")), could unleash the might of the SEC to retaliate against LIN. Despite these and additional dire threats, LIN stood his ground and told HOFFMAN that he would still pursue justice.

LIN soon discovered that he was blacklisted and unable to find employment in the investment industry. To make a living, LIN began publishing an investment newsletter and writing for the local newspapers such as the San Jose Business Journal and the San Jose Mercury News. Relentlessly, PRUDENTIAL and the NYSE then began a vicious campaign of unfair competition to stop LIN's First Amendment activities of disseminating disabusing investment information to the public and to destroy LIN's livelihood. PRUDENTIAL and BALL also unleashed the might of the SEC to force LIN to end his First Amendment newsletter activities.

In state court, PRUDENTIAL respondents submitted perjured declaration that the August document were valid while the July contract was not. It is undisputed that the August document was never followed in any

way whatsoever by any party, precisely because it was in fact bogus and sham. This fact and PRUDENTIAL's performance of and adherence to the July contract (until it decided to constructively discharge LIN for LIN's protests against PRUDENTIAL's illegal corporate practices), exposed and proved PRUDENTIAL's bad faith misrepresentation and fraud upon the court. In using the bogus August document to compel LIN to arbitrate his suit on the July contract, PRUDENTIAL respondents proved by conduct that their fraud and misrepresentation on August 20, 1984 were premeditated and directed at the arbitration clause, with the objective of depriving LIN of his federal Constitutional right to a trial by jury in a court of law.

Although there was never any trial or evidentiary hearing on the preliminary issue of fraud, as required under law, the California Sixth Appellate District, in a not-to-be-published opinion, reversed the lower court and ordered LIN to arbitrate his wrongful termination suit before NYSE. LIN appealed to the California Supreme Court which declined review without explanation, Such results underscored the gravity of the injury caused by PRUDENTIAL respondents in their perpetration of fraud against LIN.

In a desperate effort to procure alibi for PRUDENTIAL's egregious conduct against LIN, PRUDENTIAL also paid money to two of LIN's former customers in return for making false charges against LIN. Said trumped-up charges were later used jointly by PRUDENTIAL and respondent NYSE to frame LIN, to deter and retaliate against LIN's wrongful

termination suit in state court against a prominent NYSE member firm and to affect the outcome of such suit, to ruin LIN's good reputation, his future career and means of livelihood, and to further achieve unfair competition.

On September 3, 1987, without prior notice to LIN or presenting LIN an opportunity to view any alleged evidence or present a defense, the NYSE secretly and unilaterally held a disciplinary hearing against LIN *in absentia* and, employing financially procured false evidence, unsurprisingly found LIN guilty of all the trumped-up charges. PRUDENTIAL and the NYSE thereafter disseminated false and defamatory statements concerning LIN to the media and the public, and successfully torpedoed LIN's First Amendment activities and his lawful living by ruining his good reputation, and violating LIN's rights to be free from racketeering injury and unfair competition.

The aforesaid tortious and continuing acts by respondents were subsequent to LIN's filing of wrongful termination suit in state court and could not have been known in advance or encompassed in his complaint at the time of his state suit. Indeed, even if LIN were prescient and could know ahead of time respondents' tortious acts, he was not precluded from seeking redress in a federal court, particularly where Constitutional and federal rights and statutes were involved.

LIN thereafter filed suit in federal district court against respondents for their conspiracy to violate and violation of LIN's civil and Constitutional rights, and for various

tortious acts that violated and continue to violate RICO Act and other federal statutes. (A copy of the complaint is reprinted in the APPENDIX, p.14a, *infra*) Not all the details of the alleged conspiracy between respondents were known to the petitioner at the time of filing of his federal court complaint. The complaint accordingly of necessity contained some conclusory allegations, with some details being left to the pretrial discovery process, and subject to amendment.

Upon service of process, all named respondents moved to dismiss: NYSE pursuant to F.R.Civ.P. 12(b)(6); BALL and HOFFMAN pursuant to F.R.Civ.P. 12(b)(2). PRUDENTIAL, STANSBERY and CLARK also alternatively moved to compel LIN to arbitrate before NYSE and for Rule 11 sanctions. LIN opposed all said motions and cross-moved for Rule 11 sanctions. Without any pretrial discovery or hearing, or opportunity to amend complaint, the district court dismissed LIN's action with respect to all defendants. Thereafter LIN appealed to the Ninth Circuit which affirmed dismissal of LIN's RICO and Clayton Act claims against NYSE and the PRUDENTIAL defendants, and the dismissal of all claims against defendants BALL and HOFFMAN. It also VACATED that part of the district court order dismissing claims based on the common law, state law, the Civil Rights statutes and the U.S. Constitution and REMANDED with directions to enter an order dismissing those claims for lack of subject matter jurisdiction. Thereafter the district court entered a dismissal with prejudice.

REASONS FOR GRANTING THE WRIT

In dismissing complaint with prejudice, prior to pretrial discovery, and without opportunity for amendment, the courts below acted contrary to the holdings of this Court, plaintiff-petitioner having alleged respondents' common law, Constitutional, civil and federal statutory torts, and there was no determination that petitioner could prove no set of facts entitling him to relief.

1. Preliminarily, it may be noted that there was no determination by the district court that petitioner LIN could prove no set of facts entitling him to relief, nor did respondents so contend.

Although the complaint was not broken down into compartments each corresponding to one cause of action, a complaint is sufficient if it gives the defendant notice of the nature and basis of the plaintiff's claim. F.R.Civ.P. 8(a); *Conley v. Gibson*, 355 U.S. 41, 2 L.Ed.2d 80, 78 S.Ct. 99 (1957).

In *Conley*, a unanimous Supreme Court, on certiorari, reaffirmed the accepted rule that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. 46-47, 2 L.Ed.2d 84.

Cautioning against dismissal, Justice Black continued in *Conley*:

> "the Federal rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." 355 U.S. 47-48, 2 L.Ed.2d 85-86.

A plain reading of plaintiff-petitioner's complaint, as reprinted in the APPENDIX (p.14a, *infra*) shows that defendants were noticed of the nature and basis of plaintiff's claims. Plaintiff's complaint went further by providing significant details, enumerating the Constitutional, statutory and common law bases on which his various causes of action and claims for relief rest. The lower court's dismissal was therefore erroneous and contrary to the holding of this Court in *Conley* and should be reversed.

2. The district court's abstention was erroneous and contrary to applicable precedents and prior decisions of this Court when plaintiff-petitioner invoked its jurisdiction to secure his Constitutional, civil and federal statutory rights against respondents' violation of same, which violations were not foreseeable in an earlier state court action.

The court of appeals also erred and acted contrary to applicable precedents and prior decisions of this Court in ordering the dismissal of claims based on federal Civil Rights statutes and the U.S. Constitution for lack of subject matter jurisdiction.

LIN's complaint sets forth allegations of defendants' tortious conduct and conspiracies against him that are violative of LIN's Constitutional and civil rights and of applicable federal laws such as R.I.C.O. Act and Clayton Act and that occurred after he no longer worked for PRUDENTIAL. These are causes of action brought for the first time and based on distinct sets of post employment events not covered by LIN's state court action. There was therefore no basis for federal court abstention.

Federal courts have a virtually unflagging obligation to exercise jurisdiction given them. *Colorado River Water Conservation District v. United States*, 424 U.S. 800. As the Ninth Circuit also conceded (APPENDIX, pp.7a-8a, *infra*) certain federal statutory claims such as under RICO and Antitrust Acts were properly within the forum of the district court. Moreover, these causes of action have never before been litigated by the parties. It was erroneous therefore for the lower courts to dismiss all causes of action by which petitioner sought to vindicate and safeguard his Constitutional and federal statutory rights.

There is no rule that says that new torts committed by defendants, which were not within the scope of an original complaint, cannot be new causes of action in an independent suit. Otherwise, a tortfeasor may easily and simply defeat substantial federal and Constitutional rights by additional aggravated conduct.

If the circuit judges and district judge could disagree in this case over district court's subject matter jurisdiction of RICO and antitrust statutes, in addition to federal Civil Rights statutes and the U.S. Constitution, clearly plaintiff is entitled to no less benefit of doubt so as to be at least afforded the opportunity to reasonable pretrial discovery and amendment of complaint in conformity therewith, before being summarily dismissed and with prejudice, as occurred here. The decisions below should be reversed.

3. Plaintiff should have been permitted to seek redress against an out-of-state defendant whose threats via instruments of interstate commerce later vicariously materialized to seriously injure him.

The lower courts' dismissal of BALL and HOFFMAN was improper because they were primary participants in alleged wrongdoing intentionally directed at petitioner in California. BALL and HOFFMAN knew or had reason to know that their intentional torts would have a devastating impact upon petitioner and that the brunt of petitioner's injury in terms of emotional distress, injury to professional reputation and economic damages would be felt in California. As a subordinate of BALL and under BALL's command, HOFFMAN played a major role in PRUDENTIAL's campaign against Plaintiff.

Likewise, BALL's role cannot be dismissed, particularly in light of the fact that the SEC did relentlessly harass Plaintiff as warned by HOFFMAN and successfully drove Plaintiff out of the newsletter publishing business

in which he would have become highly successful. As a powerful figure at PRUDENTIAL, it is not essential that defendant BALL personally executed the tortious acts to render him liable. It is sufficient that he directed or caused one or more of his agents including defendant HOFFMAN to carry out said tortious acts and caused Plaintiff LIN injury in California.

BALL and HOFFMAN's acts and conduct were calculated to effectuate injury to petitioner in California. This Court in *Calder v. Jones,* 465 U.S. 783, 79 L.Ed.2d 804, 104 S.Ct. 1482 teaches that the court in California has jurisdiction over BALL and HOFFMAN causing injuries suffered by LIN in California. The lower courts' dismissal of action as to BALL and HOFFMAN was therefore contrary to the holding in *Calder* and should be reversed.

As a result of lower courts' dismissal of petitioner's suit with prejudice, petitioner is left without legal remedy for the Constitutional and federal torts he suffered in the hands of the respondents. He was rendered "effectively out of court" even though the transgressions of the respondents as alleged show that he had every right to be in and was entitled to relief.

In effect, the lower courts' decision grants a defendant complete immunity for federal statutory, civil rights and Constitutional torts against a plaintiff. That should not be.

The lower courts' dismissal of petitioner's action also denies any practical significance to respondents' fraud

and other wrongdoings and the resultant continuing civil and Constitutional injuries to petitioner. The judgment below had the further effect of reassuring respondents of their immunity from suit in federal court for their federal torts, no matter how egregious.

CONCLUSION

WHEREFORE, for all the foregoing argument and reasons, petitioner LIN respectfully submits that this petition for certiorari should be granted. If the petitioner is correct that his suit should not have been dismissed, LIN prays that the matter be remanded to the district court for appropriate disposition, after a full development of the facts.

Respectfully submitted,

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APPENDIX

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
(FILED March 20, 1991, Cathy A. Caterson, Clerk, U.S. Court of Appeals)

No. 89-16451
D.C. No. CV-89-20110-WAI

WALLACE E. LIN
Plaintiff-Appellant,
v.
PRUDENTIAL-BACHE SECURITIES, INC.; GEORGE BALL, KEVIN HOFFMAN; EUGENE STANSBERY; CARRINGTON CLARK, JR.; NEW YORK STOCK EXCHANGE, INC.
Defendant-Appellees.

On Appeal From the United States District Court
for the Northern District of California
William A. Ingram, Chief Judge, Presiding

Argued and submitted March 11, 1991
San Francisco, California

Before: CHAMBERS, BEEZER and NOONAN, Circuit Judges

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Wallace Lin appeals the district court's dismissal of is action and the denial of is request for sanctions. We affirm.

I

Lin brought an action in the Santa Clara County Superior Court against Prudential-Bache, Eugene Stansbery, Carrington Clark ("Prudential Defendants") and Kevin Hoffman for wrongful discharge, breach of contract, breach of the covenant of good faith and fair dealing, fraud and misrepresentation, loss of prospective business advantage and intentional infliction of emotional distress. The Superior Court denied the defendants' motion to compel arbitration. The denial was reversed by the Court of Appeal of the State of California, Sixth Appellate District. The Supreme Court of California denied review.

Rather than initiate arbitration, Lin brought suit in federal district court against the same defendants, with the addition of George Ball, Chairman and CEO of Prudential-Bache, and the New York Stock Exchange ("NYSE"). In addition to essentially the same causes of action raised in his state action, Lin raised claims based on the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.* (RICO), the Clayton Act, 15

• This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

U.S.C. 15, various Civil Rights statutes and the U.S. Constitution.

The district disposed of the case in the following manner: it granted defendant NYSE's motion to dismiss for failure to state a claim; it granted defendants Ball and Hoffman's motion to dismiss for lack of personal jurisdiction; it granted defendants Prudential, Stansbery and Clark's motion to dismiss on the basis that the claims against these defendants were arbitrable and that Lin's action was "an unacceptable circumvention of the arbitration ordered by the state court"; and, it denied Lin's cross-motion for sanctions. Lin appeals each of these dispositions.

II
SUBJECT MATTER JURISDICTION

Ball, Hoffman and the Prudential defendants assert that the district court did not have subject matter jurisdiction over Lin's claims because the complaint essentially asked the district court to review determination of the state court. A United States district court "has no authority to review the final determinations of state court in judicial proceedings." *Worldwide Church of God v. McNair*, 805 F.2d 888, 890 (9th Cir. 1986) (citing, *inter alia, District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983)). "This doctrine applies even when the challenge to the state court decision involves federal constitutional issues." *Id.* at 891 (citations omitted). The test is whether the claims brought in federal court are "inextricably intertwined" with the state court's decision, such that a decision by

the federal court would require reviewing the propriety of the state court decision. *Id.* at 892 (citing *Feldman*, 460 U.S. at 483-84 n.16). It does not matter that a plaintiff did not raise the federal claims in the state court, as long as he could have done so. *Feldman*, 460 U.S. at 482-84 n.16.

Pursuant to these principles, the district had no jurisdiction over Lin's pendent claims arising out of the common law and state law, the Civil Rights statutes, and the First, Fifth and Eighth Amendments to the U.S. Constitution, because these claims clearly are based on exactly the same conduct and allegations that formed the basis for his state court action. The claims of misconduct in the state court action should have been raised before the California courts and could have been appealed to the United States Supreme Court after a decision by the Supreme Court of California. See 28 U.S.C. 1257 (1988).

The RICO and Clayton Act claims were not brought in the state court action and appear to arise out of conduct occurring after the state court decision[1]. Thus the district court did have jurisdiction over these claims[2].

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[1] It is unclear, however, exactly what conduct constitutes the basis for these claims.

[2] Additionally, the Clayton Act claims are not inextricably intertwined because "federal antitrust claims are within the exclusive jurisdiction of the federal courts," see *Eichman v. Fotomat Corp.*, 759 F.2d 1434, 1437 (9th Cir. 1985) (citation omitted), and thus Lin could not have brought these claims in state court.

III
DISMISSAL OF CLAIMS AGAINST THE NYSE FOR FAILURE TO STATE A CLAIM

We review *de novo* a dismissal for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6). *Fort Vancouver Plywood Co. v. United States*, 747 F.2d 547, 552 (9th Cir. 1984). "The complaint should be not be dismissed 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief.'" *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Even under this demanding standard of review, however, we find no reason to disagree with the district court that "the complaint is rambling and conclusory. Plaintiff's narrative is largely unsupported by facts, and it is unclear which claims are made against which defendant, NYSE in particular." Compare, for example, LIN's complaint at paragraphs 6, 12 and 17, by which he attempts to state a claim of a RICO violation, with *United Energy Owners v. United Energy Mgmt.*, 837 F.2d 356, 359 (9th Cir. 1988) (dismissal of RICO for failure to state a claim reversed).

IV
DEFENDANTS BALL AND HOFFMAN

The district court dismissed the claims against Ball and Hoffman on the ground that it lacked personal jurisdiction over them. We review *de novo* a dismissal

for lack of personal jurisdiction. *Haisten v. Grass Valley Medical Reimbursement*, 784 F.2d 1392, 1396 (9th Cir. 1986).

Lin does not allege that the district court had general jurisdiction over Ball and Hoffman, but rather that "they were primary participants in alleged wrongdoing intentionally directed at Plaintiff in California." This is language that suggests limited jurisdiction, which arises if the nonresident defendant does "some act or consummate[s] some transaction with the forum or perform[s] some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protection of its laws" and if the claims is "one which arises out of or results from the defendant's forum-related activities." See *Hirsch v. Blue Cross, Blue Shield of Kansas City*, 800 F.2d 1474, 1477 (9th Cir. 1986).

"[A] corporate officer who has contact with a forum only with regard to the performance of his official duties is not subject to personal jurisdiction in that forum." *Forsythe v. Overmyer*, 576 F.2d 779, 783-84 (9th Cir.), cert. denied, 439 F.2d 864 (1978) (citation omitted). Additionally, " the use of the mails, telephone, or other international communications simply do not qualify as purposeful activity invoking the benefits and protection of the [forum] state." *Peterson v. Kennedy*, 771 F.2d 1244, 1262 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986) (citations omitted).

Hoffman is Vice-President and Assistant General Counsel at Prudential. the only contact Lin alleges[3] between Hoffman and California is that Hoffman made telephone calls from New York to Lin in California to discuss this litigation. Ball is Chairman and Chief Executive Officer of Prudential. The only connection Lin suggests between Ball and this action is that Hoffman warned Lin that "with just one phone call, Ball can unleash the might of the Securities & Exchange Commission to make [Lin's] life miserable and painful." These activities are not sufficient to establish either general or limited personal jurisdiction over these defendants. See *Peterson*, 771 F.2d at 1262-63 (no personal jurisdiction over defendant whose only contacts with the forum state were a series of telephone calls made to plaintiff and letters to a physician in the forum state regarding the suit).

V
THE PRUDENTIAL DEFENDANTS

The district court dismissed the claims against these defendants because they could be arbitrated in accordance with the order of the California Court of Appeals and that the present action was "an unacceptable circumvention of the arbitration ordered by the state court." However, the RICO and Clayton Act claims were not a part of the state court action and it is not clear that they could be arbitrated. Thus the

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[3] The burden rests with the party seeking to invoke the court's jurisdiction to establish that jurisdiction exists." *Hirsh*, 800 F.2d at 1477 (citation omitted).

district court erred in dismissing these claims against the Prudential Defendants.

However, every paragraph of the complaint that alleges a RICO or Clayton Act violation makes one allegation with respect to both the NYSE and the Prudential Defendants. Just as the suit was properly dismissed with respect to the NYSE for failure to state a claim, the dismissal with respect to the Prudential defendants may be affirmed on the ground that Lin failed to state a claim. There was no greater clarity or elaboration with respect to the Prudential defendants than there was regarding the NYSE.

VI
ATTORNEYS' FEES

We apply an abuse of discretion standard in reviewing all aspects of district court's Rule 11 determination. *Teamsters Local Union No. 760 v. United Parcel Service*, 921 F.2d 218, 219 (9th Cir. 1990) (citing *Cooter & Gell v. Hartmax Corp.*, 110 S.Ct. 2447, 2461 (1990)).

Lin asserts that Rule 11 sanctions were appropriate because the defendants threatened him with Rule 11 sanctions if he did not drop the suit, misstated facts and misrepresented contrary authority. The record indicates that the discussion of sanctions between Lin and counsel for the defendants took place in the context of the propriety of bring in federal court an action based on the same claims Lin presented to the state court. The record further indicates that the alleged misstatements of law are nothing more than a disagreement regarding the applicability of previous

decisions of the Supreme Court and this circuit to the present case. The district court did not abuse its discretion in denying Lin's request for sanctions.

We AFFIRM the dismissal of Lin's RICO and Clayton Act claims against NYSE and the Prudential Defendants, and the dismissal of all claims against Defendants Ball and Hoffman. That part of the order dismissing claims based on the common law, state law, the Civil Rights statutes and the U.S. Constitution is VACATED and REMANDED with directions to enter an order dismissing those claims for lack of subject matter jurisdiction.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA
(FILED Sep. 21, 1989, Richard W. Wieking, Clerk, U.S. District Court, N. D. of California, San Jose)

NO. C-89-20110-WAI

WALLACE LIN
Plaintiff,
v.
PRUDENTIAL-BACHE SECURITIES, INC., GEORGE BALL, KEVIN HOFFMAN, EUGENE STANSBERY, CARRINGTON CLARK, JR., THE NEW YORK STOCK EXCHANGE, INC., DOES ONE THROUGH FIFTY,
Defendants

The following motions were submitted without oral argument pursuant to Local Rule 220-1 on June 12, 1989: (1) defendant New York Stock Exchange's (NYSE) motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), (2) defendants George Ball and Kevin Hoffman's motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(2), (3) defendants Prudential-Bache, Eugene Stansbery and Carrington Clark's (Prudential defendants) motions to dismiss, or in the alternative to compel arbitration, and for sanctions, and (4) plaintiffs cross-motion for sanctions. Having considered the parties' papers, the court ORDERS
(1) NYSE's motion to dismiss GRANTED, (2) defendants Ball and Hoffman's motion to dismiss for

lack of personal jurisdiction GRANTED, (3) Prudential defendants' motion to dismiss GRANTED and for sanctions DENIED, and (4) plaintiff's cross-motion for sanctions DENIED. This action is, accordingly, DISMISSED.

Plaintiff's complaint purports to allege a multitude of claims under RICO, the Clayton and Civil Rights Acts, the Constitution and various state laws. Plaintiff was apparently employed by Prudential-Bache until he allegedly mishandled an account, was terminated, and eventually suspended and fined by NYSE.

1. NYSE's Motion to Dismiss

At its simplest, the complaint is rambling and conclusory. Plaintiff's narrative is largely unsupported by facts, and it is unclear which claims are made against which defendant, NYSE in particular. Accordingly, NYSE's motion to dismiss for failure to state a claim is GRANTED.

2. Defendant Ball and Hoffman's Motion to Dismiss

It is clear from the papers that the court does not have general personal jurisdiction over these defendants because their alleged contacts with California are neither "substantial" nor "continuous and systematic." *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1287 (9th Cir. 1977).

The court also finds limited personal jurisdiction does not exist over these defendants because the "nature and quality" of their contacts with California relevant to this action are insufficient. *Id.* at 1287 (outlining three part test to determine consistency of

due process and exercise of limited personal jurisdiction). The "use of the mails, telephone, or other international communications simply do not qualify as purposeful activity invoking the benefits and protection of the [forum] state." *Peterson v. Kennedy*, 771 F.2d 1244, 1262 (9th Cir. 1985) (citations omitted). Defendants only contact with plaintiff and this state was over the telephone, see, e.g. Ball and Hoffman Declarations, and "[s]uch contacts are normally legally insufficient to satisfy the first prong of the *Data Disc* test." *Id.* at 1262.

"Moreover, a corporate officer who has contact with a forum only with regard to the performance of his official duties is not subject to personal jurisdiction in that forum." *Forsythe v. Overmyer*, 576 F.2d 779, 783-84 (9th Cir. 1978) (citation omitted). Accordingly, defendants Ball and Hoffman's motion to dismiss for lack of personal jurisdiction is GRANTED and these defendants are DISMISSED for this action.

3. Prudential Defendants' Motions

In August 1985, plaintiff filed a complaint against these and other defendants in state court alleging wrongful discharge, breach of contract, breach of covenant of good faith and fair dealing, fraud and misrepresentation, loss of prospective business advantage, and intentional infliction of emotional distress. Boutin Declaration, Exh.A. In June, 1987, the Sixth District Court of Appeal ordered plaintiff to arbitrate his claim against these defendants before the New York Stock Exchange. *Id.*, Exh. B. Plaintiff's appeal of that decision to the California Supreme Court was denied in September, 1987. *Id.*, Exh. C.

Plaintiff's present complaint alleges similar claims and seeks similar relief as his state action. Certain of plaintiff's claims, allegedly arising after his termination, are also arbitrable. *Zolezzi v. Dean Witter Reynolds, Inc.*, 789 F.2d 1447 (9th Cir. 1986). Moreover, the court views this action as an unacceptable circumvention of the arbitration ordered by the state court. Accordingly, the Prudential defendants' motion to dismiss is GRANTED, and this court shall abstain from exercising its jurisdiction in this matter. See *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

4. Plaintiff's Motion for Sanctions

Consistent with the above, plaintiff's cross-motion for sanctions is DENIED.

Dated: 9 19 89

WILLIAM A. INGRAM
United States District Judge

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926 Mesa Oak Court
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408-720-8002
Plaintiff *in pro. per.*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
Case No. CV-89-20110-WAI

WALLACE E. LIN
Plaintiff
v.
PRUDENTIAL-BACHE SECURITIES, INC.
George Ball, Kevin Hoffman,
Eugene Stansbery, Carrington Clark, Jr.,
NEW YORK STOCK EXCHANGE, INC.
DOES ONE THROUGH FIFTY
Defendants

COMPLAINT FOR DAMAGES
AND INJUNCTIVE RELIEF
(JURY TRIAL REQUESTED)

JURISDICTION:

1. This action is brought under:

1.(a) Racketeer Influenced & Corrupt Organizations Act, ("R.I.C.O. Act") 18 U.S.C. 1961 *et. seq.*

1.(b) Clayton Act, 15 U.S.C. 15;

1.(c) Civil Rights Act, 42 U.S.C. 1981-2; 42 U.S.C. 1985(2)-(3); 42 U.S.C. 1986;

1.(d) the Constitution of the United States.

2. This Court has jurisdiction over the subject matter under 28 U.S.C. 1331 and 1343. Venue is proper under 18 U.S.C. 1965.

3. Plaintiff also claims and prays for damages and relief, under the principles of pendent jurisdiction, for injuries relating to common law and state causes of action arising from the following:
Interference with Contract, Breach of Covenant of Good Faith and Fair Dealing, Breach of Contract, Negligent Misrepresentation, Civil Conspiracy, Interference with Prospective Advantage, Perjury and Fraud in Civil Proceedings, Selective False Prosecution, Fraud, Malice and Oppression, Unfair Trade Practices, Defamation, Trade Libel, Negligent Infliction of Emotional Distress, Intentional Infliction of Emotional Distress, Racial Discrimination,Persecution for Dissemination of Disabusing Financial Market Information.

4. Plaintiff respectfully requests for a jury trial on each claim and cause of action for which a right to jury trial is afforded by law.

THE PARTIES:

5. The Plaintiff, Wallace E. Lin, ("LIN"), is a United States citizen but a racial minority of color, who has contributed in various important ways to the welfare and security of the United States in defense and medicine, among other areas, and in the process have won the commendation of the White House, members

of the Senate and House, the FBI, National Security Agency, Security Intelligence Agency, National Institutes of Health, Bureau of Narcotics and Dangerous Drugs, among others.

6. Defendant Prudential-Bache Securities, Inc. ("PRUDENTIAL") is a member of the New York Stock Exchange ("EXCHANGE") and an "enterprise", as that term is defined in 18 U.S.C. 1961, engaged in interstate commerce and the activities of which affect interstate commerce. Such activities in and affecting interstate commerce include, inter alia, the purchase and sale of securities and the dissemination to the public of transaction-inducing information which move in interstate commerce.

7. Defendant George Ball ("BALL") was the chief executive officer and chairman of E.F. Hutton Inc. (formerly a prominent member of the New York Stock Exchange) and was instrumental in the creation and maintenance of the infamous multi-billion dollar E.F. Hutton check kiting scheme prior to joining PRUDENTIAL as the latter's Chief Executive Officer. At all relevant times mentioned herein, BALL acted as the CEO of PRUDENTIAL.

8. Defendants Kevin Hoffman ("HOFFMAN"), Eugene Stansbery ("STANSBERY"), Carrington Clark, Jr. ("CLARK") are or were senior executive officers of Defendant PRUDENTIAL. At all relevant times mentioned herein, they acted within the scope and authority of their employment as senior executives of PRUDENTIAL.

9. The New York Stock Exchange, Inc. ("EXCHANGE") is a organization and an "enterprise", as that term is defined in 18 U.S.C. 1961, engaged in interstate commerce and the activities of which affect interstate commerce. Such activities in and affecting interstate commerce include, inter alia, the purchase and sale of securities and the dissemination of trading-inducing financial information which move in interstate commerce.

10. Plaintiff does not know the true names and capacities, whether individual, corporate, associate or otherwise, of the Defendants named herein as DOES ONE through FIFTY, inclusive, and therefore claims against said Defendants by such fictitious names. Plaintiff will amend this Complaint to show their true names and capacities when ascertained.

11. Plaintiff is informed and believes, and thereon alleges, that each of the Defendants designated herein as DOE is legally responsible in some manner for the occurrences herein alleged, and are legally liable to Plaintiff, either directly or through an agent, for the injuries suffered by Plaintiff as herein alleged. Each DOE Defendant acted in concert with each and every other named Defendant, intended to and did participate in and cause the events, acts and practices and courses of conduct against Plaintiff as alleged herein, and proximately caused damages and injuries thereby to Plaintiff as alleged herein.

STATEMENT OF CLAIMS & CAUSES OF ACTION

12. Plaintiff worked for Defendant PRUDENTIAL, pursuant to a confidential agreement (EXHIBIT A, attached hereto). In the course of his employment, Plaintiff discovered and uncovered, *inter alia*, how PRUDENTIAL was able to manipulate certain customer securities transactions to create artificial but totally avoidable losses which accrued to the benefit of PRUDENTIAL but at the expense of the customers and the public. Plaintiff did not acquiesce in such wrongful conduct and opposed and sought to remedy it.

13. At the same time, Plaintiff was able to attract large Fortune 500 clients by the dissemination of disabusing investment information which was viewed negatively in a competitive light by PRUDENTIAL. Thereafter, upon information and belief, PRUDENTIAL, BALL, HOFFMAN, STANSBERY and CLARK conspired to constructively discharge Plaintiff through the use of pretexts and misrepresentation and did succeed in constructively discharging Plaintiff on February 15, 1985, in bad faith and in breach of their confidential written employment agreement with Plaintiff.

14. Upon information and belief, after Plaintiff's constructive and wrongful termination by said PRUDENTIAL Defendants, and in anticipation of civil action by Plaintiff against them as well as to pre-empt the Plaintiff's public dissemination of disabusing financial market information in competition with them and to prevent and silence Plaintiff's possible expose of insider secrets that would be embarrassing to them, said

PRUDENTIAL Defendants conspired to unleash a relentless and ongoing campaign against Plaintiff. The objectives were and are to trade libel, defame and discredit Plaintiff, to silence him, to deter Plaintiff's civil suits against them through intimidation and veiled death threats, to destroy Plaintiff's ability to compete with PRUDENTIAL and to deprive him of his rights and property and means of livelihood, using various schemes and artifices and enlisting the covert aid of the EXCHANGE and, upon information and belief, that of the Securities and Exchange Commission ("SEC") through the special personal relationship between BALL and John Shad, who was then the Chairman of the SEC.

15. PRUDENTIAL Defendants' unlawful activities include, without limitation, the following:

15(a) The employment of the agency of the EXCHANGE to harass and bring groundless charges against Plaintiff to deter and influence Plaintiff's lawsuit against PRUDENTIAL Defendants and to achieve other unlawful objectives that are in violation of R.I.C.O. Act and Clayton Act.

15(b) The financial procurement of false statements against Plaintiff for selective and false prosecution by the EXCHANGE on behalf of PRUDENTIAL in the ruse of "investigation" or "enforcement";

15(c) The arrangement for the willful deprivation by the EXCHANGE of Plaintiff's procedural and substantial due process rights during such investigatory ruse to ensure the orchestrated and predetermined outcome of such selective false prosecution by the EXCHANGE wherein Plaintiff was denied the

opportunity to confront any alleged evidence against him or present his defense.

15(d) The fabrication, issuance and dissemination, in conspiracy and concert with the EXCHANGE, of trade libel and defamatory statements against Plaintiff, for purposes of unfair competition against Plaintiff's disabusing information, and to control, monopolize, censor and "sanitize" the financial information channels such that the public will react in a predictable way to planted disinformation or baseless rumors, without the benefit of contrary disabusing information, and buy or sell at a loss while the manipulators effortlessly reap the enormous illicit profits by taking the other side of the trade.

15(e) The deliberate submission of false and perjurious affidavits to obstruct justice and prevent Plaintiff from receiving redress in a court of law and to compel Plaintiff to arbitrate his claims against PRUDENTIAL Defendants before none other than the very EXCHANGE that has so assiduously sought to frame him and deprive him of his liberty and property without due process of law on behalf of and in conspiracy with PRUDENTIAL Defendants.

16. As a result of the EXCHANGE and PRUDENTIAL Defendants' efforts to impede, hinder, obstruct or defeat the due course of justice in the State of California, Plaintiff has been injured in his efforts to seek redress and vindication in a court of law and been deprived of his procedural and substantive due process and denied the right of equal protection of the laws, within the meaning of 42 U.S.C. 1985(2) and (3).

17. In performing the above and other wrongful acts, PRUDENTIAL Defendants, in concert with EXCHANGE, transmitted and caused to be transmitted communications by means of mail, telephone or other instrumentalities of interstate commerce, the use of one or more of which occurred on more than one occasion each in the past ten years, satisfying, for the purpose of this action, a pattern of racketeering activity in violation of 18 U.S.C. 1962.

18. In carrying out the aforesaid activities, PRUDENTIAL Defendants, in conspiracy with Defendant EXCHANGE, sought to combine or conspire with one another and other Wall Street interests to monopolize the marketing, dissemination and distribution of investment news, information and services by restraining and attempting to restrain disabusing competitors such as Plaintiff from entering, remaining or expanding in such markets.

19. Defendants intended by their course of wrongful conduct to undermine Plaintiff's trade or business so as to render him unable to compete with them and other Wall Street special interests, and to unlawfully, wantonly, maliciously and oppressively restrain trade and competition and to engage in unfair competition.

20. Such monopoly, attempted monopoly and conspiracy to harass and arrange to harass and cause economic harm to business competitors such as Plaintiff, so as to monopolize the marketing and distributing of investment services and information as alleged above, and by other illegal and unlawful means,

has caused Plaintiff to be denied the benefits of a free and competitive market and further injured in his person and business, all in violation of Clayton Act, 15 U.S.C. 15, and other applicable California laws.

21. Plaintiff's harsh treatment and abuse by PRUDENTIAL Defendants and the EXCHANGE would not have been as prolonged or, if so, the partisan persecution would not have been as severe or aggravating if Plaintiff were not a minority of color, and therefore perceived by Defendants as an easy prey. The acts and conduct of Defendants were tainted and polluted by bias and racial prejudice and Plaintiff has been deprived of equal protection of the laws and of equal privileges and immunities under the laws, and injured in his person and property, and discriminated on the basis of his race, color, national origin and/or minority status in violation of 42 U.S.C. 1981, 42 U.S.C. 1985(2) and (3), 42 U.S.C. 1986, the Fifth and Eighth Amendment of the Constitution and the California Fair Employment Practice and Housing Act.

22. Defendant EXCHANGE knowingly refused to investigate and stop its EXCHANGE member clients' illegal and fraudulent conduct, pattern and practices that were brought to its attention by Plaintiff and thereby sanctioned, ratified, abetted and encouraged said fraudulent schemes and said continued misconduct and fraud against the Plaintiff and the public, in breach of its fiduciary obligations and duties to the Plaintiff and the public and in subversion of public trust.

23. No affirmative steps whatsoever have been taken by the EXCHANGE to date that may resemble even a superficial "investigation" of the rampant looting of customer accounts by certain prominent EXCHANGE members on whose service the EXCHANGE conducted its own acts of fraud, malice and oppression against Plaintiff. Obviously such actions against EXCHANGE members would significantly reduce the protected EXCHANGE members' illicit profits.

24. By its intentional, purposeful and unsurprising failure to investigate, prevent and correct fraud and racketeering by certain EXCHANGE members that are under its protection, the EXCHANGE reveals what it already knows about said financial crimes but condones them, and show that it is clearly not interested in regulating its members or correcting fraud, but is bent on using its might and any power and means at its disposal to protect and cover up for its favored EXCHANGE member clients and to selectively and falsely frame up and prosecute any innocent or whistle-blower who stands in the way of the illicit profits and pecuniary interests of said special EXCHANGE member clients.

25. The EXCHANGE, in conspiracy and partnership with PRUDENTIAL Defendants and other culpable EXCHANGE member clients as described above, are thus willing participants in the latter's various illegal activities which are therefore chargeable to and binding upon the EXCHANGE. The EXCHANGE is therefore in equal violation of various

laws with respect to said illegal activities, including, but not limited to the following:

25(a) -- The making or circulating of false and misleading statements on material information for the purpose of inducing the purchase or sale of a security, 15 U.S.C. 78, 18 U.S.C. 1341 and 1343.
25(b) -- The issuance of false information concerning the financial status of customers in order to artificially create losses, inflate the margin amounts and margin interests charged and to wrongfully convert customers' cash or securities
25(c) -- The collection of an unlawful debt prohibited under 18 U.S.C. 1961(6) in that the debts were artificially and fraudulently created by artificial losses and the artificial debt plus interest constituted usury.
25(d) -- The use of fraudulent documents to maintain a pattern of racketeering activity.
25(e) -- The device and implementation of schemes to defraud the public into accepting various false financial statements as true and correct
25(f) -- The use of "device or scheme" under Securities Act Section 17(a)
25(g) -- The commission of common law civil fraud
25(h) -- The commission of common law criminal fraud
25(i) -- The commission of civil conspiracy
25(j) -- The commission of criminal conspiracy
25(k) -- The violation of the rules and regulations of the Federal Reserve Board and the New York Stock Exchange.
25(l) -- The misrepresentation or omission in any interstate communication in connection with offer or sale of securities -- Securities Act Section 12(2);

25(m) -- The violation of anti-fraud provisions of Securities Exchange Act of 1934 ("Exchange Act") Section 10(b) and Rule 10(b)-5 and 15 U.S.C. 78j;
25(n) -- The violation of anti-fraud provisions of California Corporation Code Sections 25401.
25(o) -- The commission of aiding and abetting in violation of Securities & Exchange Act Section 10(b) and California Corporate Code 25501.1.
25(p) -- The commission of fraud on the market and market manipulation in violation of California Corporations Code 25400(d).
25(q) -- The use or nondisclosure of material nonpublic information to manipulate and affect prices of markets and securities and the use of devices and schemes to defraud the public in violation of Cal. Corp. Code 25402 and 25502.
25(r) -- The nondisclosure of devices and schemes to manipulate securities prices during the sale of said securities in violation of Cal. Corp. Code 25503
25(s) -- The willful circulation of false and misleading statements to induce purchase or sale of securities in violation of Calif. Corp. Code Sec. 25400 and 25500
25(t) -- The violation of R.I.C.O., 18 U.S.C. 1961-1968, resulting in injury to Plaintiff's business and property from pattern of racketeering activities.
25(u) -- The use of money, power and connections to infiltrate and corrupt legitimate businesses, governmental agencies and to subvert and corrupt democratic processes
25(v) -- The violation of 18 U.S.C. 1961(1)(D) which pertains to offenses involving fraud connected with a case under Title 11, fraud in the sale of securities.

25(w) -- The violation of federal Civil Rights statutes 42 U.S.C. 1981, against racial discrimination and for conspiracy to harass, intimidate and injure Plaintiff in order to deter lawsuits.

25(x) -- The violation of federal Civil Rights statutes 42 U.S.C. 1985(3), against conspiracy to deprive and deprivation of equal protection of the laws, and equal privileges and immunities under the laws, and for injury to Plaintiff in his person or property.

25(y) -- The violation of federal Civil Rights statutes 42 U.S.C. 1986, against official toleration of anti-civil rights conspiracies.

25(z) -- The violation of anti-trust provisions of Clayton Act, 15 U.S.C 15 in that the effect of the above described acts, conduct and practices of Defendants has been and will continue to be a substantial lessening of competition, or the creation or maintenance of a monopoly in the marketing and distribution of investment information and services, areas in which Plaintiff did and does business.

25(z1)-- The violation of Plaintiff's First Amendment rights to free speech

25(z2)-- The violation of Plaintiff's Fifth Amendment rights not to be deprived of life, liberty, or property, without due process of law

25(z3)-- The violation of Plaintiff's Eighth Amendment rights to be free from cruel and unusual punishment.

25(z4)-- The violation of 18 U.S.C. 203-208, Ethics in Government Act of 1978 by employees or agents of the Defendant EXCHANGE some of whom capitalized on their former position at and connections with the SEC to facilitate the tortious and wrongful activities against Plaintiff.

26. As a further direct and proximate result of Defendants' wrongful acts and conduct, as aforementioned, Plaintiff's professional standing, good name and reputation in the investment community, his recognition as an able, faithful, diligent and competent professional, his employability and ability to be employed, have been irreparably damaged, ruined or lost.

27. As a further direct and proximate result of the Defendants' tortious and wrongful acts and conduct, as aforementioned, Plaintiff has been successfully silenced and deprived of his aforesaid rights and has suffered and continues to suffer irreparably and enormously various financial losses and personal injury including loss of employment, loss of advantageous business relations and goodwill, loss of current and future income, loss of earning power, loss of existing and prospective business advantage, loss of profitable business relations and business opportunities, loss of remunerative professional and career advancement opportunities, loss of prestige, professional recognition and stature, plus loss of self-confidence and self-esteem.

28. In performing and undertaking the aforementioned wrongful acts and conduct, Defendants, and each of them, intentionally, maliciously and oppressively, and with extreme and outrageous conduct, sought to inflict severe emotional distress upon Plaintiff and acted with a conscious and reckless disregard for, and gross indifference to, the rights of the Plaintiff.

29. As a further direct and proximate result of Defendants' intentional wrongful acts and conduct, as aforementioned, Plaintiff has suffered humiliation, mental anguish, emotional trauma, and severe emotional distress, plus other incidental and consequential damages.

30. In light of the foregoing, Plaintiff is entitled to compensatory, general and punitive damages in amounts sufficient to punish Defendants and each of them and sufficient to make an example of each of the Defendants.
Wherefore, Plaintiff prays for judgment, relief and compensation as set forth below

PLAINTIFF'S PRAYER FOR RELIEF:

31. WHEREFORE, Plaintiff prays for relief as follows:
31(a) Compensatory, general and exemplary damages in an amount sufficient to punish the Defendants and each of them and sufficient to make an example of each of the Defendants for R.I.C.O. Act violations against Plaintiff and as provided under R.I.C.O. Act and in accordance with 18 U.S.C. 1964(c);
31(b) Compensatory, general and exemplary damages in an amount sufficient to punish the Defendants and each of them and sufficient to make an example of each of the Defendants for anti-trust violations against Plaintiff as provided under Clayton Act, 15 U.S.C. 15;
31(c) Defendants, unless perpetually enjoined and restrained, will continue with their conspiracies as alleged above and Plaintiff and the public will continue

to suffer irreparable injury. Thus, Plaintiff and the public are entitled and Plaintiff therefore prays for injunctive relief perpetually enjoining Defendants and each of them from ever engaging in aforesaid unlawful and wrongful activities and conspiracies.

31(d) Compensatory, general and punitive damages in an amount sufficient to punish the Defendants and each of them and sufficient to make an example of each of the Defendants for each of the common law causes of action enumerated in Paragraph 3 above.

31(e) Compensatory, general and punitive damages in an amount sufficient to punish the Defendants and each of them and sufficient to make an example of each of the Defendants for each of the wrongs or statutory violations enumerated under Paragraph 25 in its sub-paragraphs 25(a) through 25(z4) above.

31(f) Compensatory, general and punitive damages in an amount sufficient to punish the Defendants and each of them and sufficient to make an example of each of the Defendants for each of the injuries alleged in Paragraphs 26 through 29, inclusive;

31(g) Damages against Defendants and each of them for loss of wages and commissions for four years and beyond, until the time of reinstatement with back pay and retroactive promotions;

31(h) Damages against Defendants and each of them for loss of investment profits and opportunities and for other investment losses caused by Defendants and each of them and their misleading and erroneous financial information and advice and by the deprivation of the Aladdin Computer System by PRUDENTIAL Defendants in an amount to be proven at trial.

31(i) Damages against Defendants and each of them for loss of various fringe benefits and other company benefits, including, but not limited to, disability benefits, survivor's benefits, life insurance benefits, medical and health insurance benefits, vacation benefits, and other benefits, the exact nature, value and extent of which to be proven at trial.

31(j) Damages against Defendants and each of them for loss of bonuses and other incentives in an amount to be proven at trial.

31(k) Additional damages, both compensatory and exemplary, against Defendants and each of them in accordance with Calif. Labor Code.

31(l) Other additional general and special damages against the Defendants and each of them according to proof;

31(m) Prejudgment interest against the Defendants and each of them in accordance with applicable laws and according to proof;

31(n) Reasonable attorney's fees and costs, against the Defendants and each of them, pursuant to applicable laws, including but not limited to, the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988; 42 U.S.C. 1985, creating a cause of action for conspiracies to interfere with civil rights; R.I.C.O. Act, 18 U.S.C. 1964(c); and Clayton Act, 15 U.S.C. 15(a).

31(o) Such other and further relief as the Court deems proper and in the interest of justice.

DATE: February 14, 1989

By Plaintiff
Wallace E. Lin , *in pro per*

Supreme Court, U.S.
FILED
JUL 31 1991
OFFICE OF THE CLERK

NO. 91-165

IN THE SUPREME COURT

Of The

UNITED STATES

October Term 1991

WALLACE LIN,

Petitioner,

vs.

PRUDENTIAL-BACHE SECURITIES INC., et al.,

Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARENT/SUBSIDIARIES
OF
RESPONDENT PRUDENTIAL-BACHE SECURITIES INC.

PARENT ENTITIES

PRUDENTIAL SECURITIES GROUP, INC.
PRUDENTIAL CAPITAL AND INVESTMENT SERVICES, INC.
PRUCO, INC.
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

SUBSIDIARIES

BACHE & CO. (LEBANON) S.A.L.
BACHE & CO. S.A. de C.V. (MEXICO)
BACHE HALSEY STUART COMMODITIES S.A.
BACHE HALSEY STUART SHIELDS (ANTILLES) N.V.
BACHE INSURANCE AGENCY, INCORPORATED
BACHE INSURANCE OF ARIZONA INC.
BACHE INSURANCE OF KENTUCKY, INC.
BACHE SHIELDS SECURITIES CORPORATION
BANOM CORPORATION
GELFAND, QUINN & ASSOCIATES, INC.
MOROSTO NOMINEES INCORPORATED
P-B FUTURES MANAGEMENT INC.
PRUDENTIAL MUTUAL FUND MANAGEMENT, INC.
PRUDENTIAL MUTUAL FUND DISTRIBUTORS, INC.

PRUDENTIAL MUTUAL FUND SERVICES, INC.
P-B HOLDING JAPAN INC.
PRUDENTIAL SECURITIES (JAPAN) LIMITED
PRUDENTIAL-BACHE CAPITAL FUNDING PUERTO RICO INC.
PRUDENTIAL-BACHE FUTURES ASIA PACIFIC LTD.
PRUDENTIAL-BACHE SECURITIES ASIA PACIFIC, LTD.
PRUDENTIAL-BACHE SECURITIES (BELGIUM) INC.
PRUDENTIAL-BACHE SECURITIES (ESPANA), S.A.
PRUDENTIAL-BACHE SECURITIES (FRANCE) S.A.
PRUDENTIAL-BACHE SECURITIES (GREECE) S.A.
PRUDENTIAL-BACHE SECURITIES (HOLLAND) INC.
PRUDENTIAL-BACHE SECURITIES (HOLLAND) N.V.
PRUDENTIAL-BACHE SECURITIES (HONG KONG) LIMITED
PRUDENTIAL-BACHE FUTURES (HONG KONG) LIMITED
PRUDENTIAL-BACHE SECURITIES (ITALY) INC.
PRUDENTIAL-BACHE SECURITIES (LUXEMBOURG) INC.
PRUDENTIAL-BACHE SECURITIES (MONACO) INC.
PRUDENTIAL SECURITIES (SOUTH AMERICA) INCORPORATED
PRUDENTIAL SECURITIES (URUGUAY) S.A.

PRUDENTIAL-BACHE SECURITIES (SWITZERLAND) INC.
PRUDENTIAL-BACHE SECURITIES (U.K.) INC.
SHIELDS MODEL ROLAND COMPANY
SHIELDS MODEL ROLAND NOMINEES
SHIELDS MODEL ROLAND SECURITIES INCORPORATED
BACHE INSURANCE AGENCY OF MISSISSIPPI, LTD.*
BACHE INSURANCE AGENCY OF OKLAHOMA, INC.*
BACHE INSURANCE AGENCY OF TEXAS, INC.*

*CORPORATION OWNED BY EMPLOYEES OF PRUDENTIAL SECURITIES INCORPORATED

I.

INTRODUCTORY STATEMENT

This Brief in Opposition to Petition for Writ of Certiorari is filed on behalf of PRUDENTIAL-BACHE SECURITIES INC. ("Prudential-Bache"), EUGENE STANSBERY and CARRINGTON CLARK, JR. ("Clark") (collectively referred to herein as the "Prudential Defendants"). In addition, this brief is filed on behalf of, and by special appearance for, GEORGE BALL ("Ball") and KEVIN HOFFMAN ("Hoffman"). The above-named parties were defendants in the District Court and appellees in the Court of Appeals proceeding below. This brief is filed in opposition to the Petition filed by WALLACE LIN, plaintiff in the District Court and appellant in the Court of Appeals proceeding below.

Petitioner seeks relief from this Court because his Complaint was dismissed and he was not given leave to amend.

Petitioner fails to state that he never requested leave to amend his Complaint. Nor does Petitioner state which claims he should have been allowed to amend. All of Petitioner's claims against Ball and Hoffman were dismissed for lack of personal jurisdiction. Except for two claims for relief, all of Petitioner's claims against the Prudential Defendants were dismissed for lack of subject matter jurisdiction. It is unclear how Petitioner could amend these claims so that they would not have been dismissed.

Petitioner does not raise a conflict of decisions between the different Circuit Courts of Appeals. Petitioner does not raise a federal question that was decided in a way that conflicts with a state court of last resort. Nor does Petitioner raise an important question of federal law that has not been, but should be, decided by this Court. Petitioner merely seeks relief from his own failure to request leave to amend his meritless claims. Accordingly, the Petition should be denied in its entirety.

II.

STATEMENT OF THE CASE

Petitioner asserts that it was improper for the District Court to dismiss his complaint with prejudice without allowing Petitioner the opportunity to amend his Complaint. This assertion is wholly unsupported by the facts of this case. Petitioner, a stockbroker,[1] initially brought an action in the Superior Court of California, in and for the County of Santa Clara, against the Prudential Defendants and Hoffman for wrongful discharge, breach of contract, breach of the covenant of good faith and fair dealing, fraud and misrepresentation, loss of prospective business advantage and intentional infliction of emotional distress. (Petitioner's Appx., pp. 2a and 12a.) In response to Petitioner's Complaint, the Prudential

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[1]Petitioner is currently serving a four (4) year suspension from the securities industry and was fined $10,000 as part of a disciplinary censure by the NYSE. The Securities and Exchange Commission affirmed the sanctions imposed on Petitioner by the NYSE. 45 S.E.C. Docket 544, Release No. 34-27666 (February 1, 1990). Petitioner is also licensed to practice law in the State of Connecticut.

Defendants and Hoffman moved to compel arbitration pursuant to Petitioner's employment contract and the Rules of the New York Stock Exchange ("NYSE"). The Superior Court denied the Motion to Compel Arbitration. The Court of Appeals of the State of California, Sixth Appellate District, reversed the Superior Court's decision and compelled Petitioner to arbitrate his claims. (Id.) The Supreme Court of California denied review. (Id.) After denial of review by the California Supreme Court, Petitioner did not petition for review to the United States Supreme Court. (Petitioner's Appx., p. 4a.)

Rather than initiate arbitration, Petitioner attempted to circumvent the order to arbitrate by filing a second suit almost two years later in federal district court against the Prudential Defendants and Hoffman, as well as against Ball, the Chairman and Chief Executive Officer of Prudential-Bache, and the NYSE. (Petitioner's Appx., pp. 2a and 14a.) In his federal suit, Petitioner asserted the same claims that he had made in his state action and, in addition, raised claims based on the Racketeer Influenced and Corrupt

Organizations Act, 18 U.S.C. 1961 et seq. ("RICO"), the Clayton Act, 15 U.S.C. 15, various Civil Rights statutes and the U.S. Constitution. (Petitioner's Appx., pp. 2a-3a and 14a.)

The District Court dismissed all of Petitioner's claims against all of the defendants in the federal action. (Petitioner's Appx., pp. 10a-11a.) In particular, the District Court dismissed the claims alleged against Ball and Hoffman for lack of personal jurisdiction. The claims against the NYSE were dismissed for failure to state a claim upon which relief could be granted. All of the claims against the Prudential Defendants were dismissed on the grounds that Petitioner's claims were arbitrable and that Petitioner's federal action was "an unacceptable circumvention of the arbitration ordered by the state court." (Petitioner's Appx., p. 13a.)

Instead of filing an amended Complaint, Petitioner appealed the District Court's Decision to the Ninth Circuit Court of Appeals. The Court of Appeals vacated the portion of the District

Court's Order with respect to Petitioner's claims based on the common law, state law, Civil Rights statutes and the U.S. Constitution. The Court of Appeals remanded these claims to the District Court and directed the District Court to dismiss them for lack of subject matter jurisdiction. (Petitioner's Appx., p. 9a.)

The Court of Appeals held that the District Court did have jurisdiction over Petitioner's Clayton Act and RICO claims. (Petitioner's Appx., p. 7a.) However, the Court of Appeals held that Petitioner failed to allege facts sufficient to state a claim under either RICO or the Clayton Act. (Petitioner's Appx., p. 8a.) The Court of Appeals affirmed the District Court's Decision in all other respects. (Petitioner's Appx., p. 9a.)

On remand, the District Court duly followed the Court of Appeals' direction and ordered that Petitioner's claims based on the common law, state law, the Civil Rights statutes and the U.S. Constitution were dismissed for lack of subject matter jurisdiction. (Respondents' Appx., pp. 1-2.) In addition, the District Court entered

Judgment dismissing the entire action with prejudice. (Respondents Appx., pp. 3-4.)[2]

Petitioner did not seek leave to amend his Clayton Act and RICO claims. Thus, it is the District Court's subsequent decision, rather than the Ninth Circuit's opinion, from which Petitioner now appeals to this Court.

III.

SUMMARY OF ARGUMENT

The arguments set forth below can be summarized as follows:

(A) Because Petitioner's Appeal To This Court Does Not Satisfy The Criteria Set Out In Supreme Court Rule 10, The Petition Should Be Denied In Its Entirety.

(B) Petitioner Has Never Requested Leave To Amend His Complaint.

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[2]Petitioner fails to provide the Court with the District Court's Order and Judgment on remand. Therefore, the District Court's Order and Judgment are reprinted in the Appendix hereto.

(C) The Court Of Appeals Correctly Held That There Was No Personal Jurisdiction Over Defendants Bail And Hoffman In The California Forum.

(D) The Court Of Appeals Correctly Held That The District Court Was Without Subject Matter Jurisdiction To Review The Decision Of A State Court In Judicial Proceedings.

IV.

ARGUMENT

A. Because Petitioner's Appeal To This Court Does Not Satisfy The Criteria Set Out In Supreme Court Rule 10, The Petition Should Be Denied In Its Entirety

Pursuant to Supreme Court Rule 10, the granting of certiorari is discretionary and is only granted when there are special and important reasons for granting review. The question presented by Petitioner does not meet any of the criteria set forth in Supreme Court Rule 10. First, the question presented by Petitioner does not involve a conflict in the decisional law of different circuits. Second, the Court of Appeals did not decide a federal question in a way that conflicts

with any rulings of the California Supreme Court. Third, the Court of Appeals did not depart from "the accepted and usual course of judicial proceedings." Fourth, the Court of Appeals did not decide a question of federal law which has not been settled or which conflicts with earlier decisions of this Court. Finally, it is apparent that there are no special reasons of significant public importance for granting the Petition in this case.

The question presented by Petitioner does not satisfy any of the criteria considered by this Court in deciding whether or not to exercise its discretion. Glaringly absent from Petitioner's brief is an explanation as to why his Petition raises issues that meet the Rule 10 criteria. Accordingly, the Petition should be denied in its entirety.

B. Petitioner Has Never Requested Leave To Amend His Complaint

Petitioner asserts that it was improper for the District Court to dismiss his claims with prejudice and without the opportunity to amend his Complaint.[3] The most compelling opposition to Petitioner's argument is that Petitioner has never requested leave to amend even though he has had the opportunity to do so at all times throughout these proceedings. (Fed.R.Civ.P. 15(a).) The District Court originally dismissed Petitioner's claims without prejudice. (Petitioner's Appx., pp. 10a-11a.) Petitioner did not file an amended Complaint, but instead, elected to appeal to the Court of Appeals. The Court of Appeals, inter alia, held that Petitioner failed to allege facts sufficient to state a Clayton Act or RICO claim for relief. (Petitioner's Appx., p. 8a.) The Court of Appeals did not dismiss Petitioner's Clayton Act and RICO claims with prejudice, but remanded the entire matter back to the District Court. (Petitioner's Appx., p. 9a.) On remand, the District Court dismissed Petitioner's

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[3]Inasmuch as no amount of amendment would cure the lack of subject matter and personal jurisdiction, Respondents presume that Petitioner's arguments regarding leave to amend apply to his Clayton Act and RICO claims for relief.

Clayton Act and RICO claims with prejudice. (Respondents' Appx., pp. 1-4.) Although Petitioner had the opportunity to seek leave to amend throughout the federal court proceedings, he chose not to do so.

Furthermore, Petitioner now appeals the District Court's dismissal with prejudice directly to the Supreme Court. The fact that Petitioner is appealing directly to this Court and bypassing the Court of Appeals is by itself grounds for denial of his Petition. The Supreme Court "has made clear its distaste for direct appeals from the district courts, both because of the resulting docket pressure and because of the lack of intermediate appellate consideration." 17 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4039 (1988). Although there are special circumstances under which a party may appeal a District Court judgment directly to the Supreme Court (see, e.g., 28 U.S.C. § 1253), none of those special circumstances is present here. Accordingly, the Petition should be denied in its entirety.

C. The Court Of Appeals Correctly Held That There Was No Personal Jurisdiction Over Defendants Ball And Hoffman In The California Forum

The Court of Appeals correctly affirmed the District Court's dismissal of the claims against Ball and Hoffman on the grounds that the District Court lacked personal jurisdiction over them. Both the Court of Appeals and the District Court properly found Ball and Hoffman did not have sufficient minimum contacts with California to establish either general or limited personal jurisdiction. (Petitioner's Appx., pp. 5a-7a and 11a-12a.)

Ball had absolutely no contacts with the California forum. (Petitioner's Appx., p. 7a.) Hoffman's contacts with the California forum consisted of several telephone calls from New York to California which were all made in the performance of his official duties. These contacts are not sufficient to support the exercise of personal jurisdiction. Forsythe v. Overmyer, 576 F.2d 779, 783-84 (9th Cir.), cert. denied, 439 U.S. 864 (1978); Peterson v. Kennedy,

771 F.2d 1244, 1262-63 (9th Cir. 1985); cert. denied, 475 U.S. 1122 (1986).

Petitioner does not even address Forsythe or Peterson. Instead, Petitioner merely rehashes his version of the facts that has been implicitly rejected by both the Court of Appeals and the District Court. In addition, Petitioner erroneously asserts that personal jurisdiction is proper under the Court's holding in Calder v. Jones, 465 U.S. 783 (1984).

Petitioner's reliance upon Calder is misplaced. In Calder, the Court held that two employees of the National Enquirer had sufficient contacts with the State of California such that the exercise of personal jurisdiction over them would not be improper. The two employees had participated in the writing of a libelous story about a resident of California. Although the story was mainly written in Florida, the reporter defendant made several trips to the forum and made numerous calls to California to gather background information.

Moreover, the national nature of the publication, and the fact that California was the state in which the National Enquirer had its largest circulation, weighed heavily in the Court's decision to exercise jurisdiction over the two employees. Id. at 785, 790.

In the instant case, Ball had no contacts with the California forum. Hoffman's only contacts were several phone calls made from New York to the Petitioner in California, the purpose of which was to investigate the customer complaints against Petitioner. Thus, the quantity and quality of contacts present in Calder are not present in this case. (Petitioner's Appx., pp. 6a-7a and 12a.) Accordingly, the Petition should be denied in its entirety.

D. The Court of Appeals Correctly Held That The District Court Was Without Subject Matter Jurisdiction To Review The Decision Of A State Court In Judicial Proceedings

This Court has made it clear that the district courts, as courts of original jurisdiction, have no authority to review the final

determinations of state courts in judicial proceedings. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983); Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 296 (1970); Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-16 (1923). In complete accordance with these precedents, the Court of Appeals held that there was no subject matter jurisdiction over Petitioner's pendent claims arising out of the common law and state law, the various Civil Rights statutes, and the First, Fifth and Eighth Amendments to the U.S. Constitution "because these claims clearly are based on exactly the same conduct and allegations that formed the basis for his state court action." (Petitioner's Appx., p. 4a.)

The aforementioned doctrine applies even when the challenge to the state court decision involves federal constitutional issues. Worldwide Church of God v. McNair, 805 F.2d 888, 890-91 (9th Cir. 1986). The test is whether the claims brought in the federal court are "inextricably intertwined" with the state court's decision,

such that a decision by the federal court would require reviewing the propriety of the state court decision. Feldman, 460 U.S. at 483-84. It does not matter that a plaintiff did not raise the federal claims in the state court, as long as he could have done so. Id.

Petitioner asserts that his claims for relief in the federal action were separate and distinct from those in the state court action and, therefore, the Court of Appeals erred in finding that the District Court was without subject matter jurisdiction to consider these claims. (Petitioner's Brief, p. 10.) Petitioner's argument is without merit. The Court of Appeals correctly found that Petitioner's pendent claims arising out of the common law and state law, the Civil Rights Statutes, and the First, Fifth and Eighth Amendments to the U.S. Constitution were based on exactly the same conduct and allegations that formed the basis for Petitioner's state court action. (Petitioner's Appx., p. 4a.) Thus, any consideration of these claims by the District Court would have required reviewing the propriety of the California Court of

Appeals' Decision which the District Court was without jurisdiction to do. See Feldman, 460 U.S. at 483-84.

Petitioner does not even address why subject matter jurisdiction should exist over his claims. Petitioner merely cites Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) for the general proposition that the federal courts have "a virtually unflagging obligation to exercise jurisdiction given them." (Petitioner's Brief, p. 10.)

Petitioner's reliance on Colorado River is misplaced. First, Colorado River involved concurrent proceedings in both a state and federal court. Id. at 806, 817. Colorado River did not involve a subsequent proceeding in federal court to essentially review a previous state court determination. Second, the Supreme Court has held that once a state court decides the issue of arbitrability, the federal court is bound to honor that determination as res judicata. Moses H. Cone

Memorial Hosp. v. Mercury Construction Corp., 460 U.S. 1, 10 (1983).

V.

CONCLUSION

For all of the reasons stated herein, the Petition should be denied in its entirety.

Respectfully submitted,

KEESAL, YOUNG & LOGAN
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APPENDIX

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. CV-89-20110-WAI

WALLACE E. LIN

Plaintiff,

v.

PRUDENTIAL-BACHE SECURITIES, INC., GEORGE BALL, KEVIN HOFFMAN, EUGENE STANSBERY, CARRINGTON CLARK, JR. and NEW YORK STOCK EXCHANGE, INC.

Defendants.

ORDER

The above-captioned action was dismissed by order of the court dated September 19, 1990. Plaintiff appealed to the United States

Court of Appeals for the Ninth Circuit. The memorandum decision by the Ninth Circuit, filed on March 20, 1991, vacated "[t]hat part of the order dismissing claims based on the common law, state law, the Civil Rights statutes and the U.S. Constitution" and remanded the case back to this court "with directions to enter an order dismissing those claims for lack of subject matter jurisdiction."

Accordingly, IT IS HEREBY ORDERED that plaintiff's claims based on the common law, state law, the Civil Rights statutes and the U.S. Constitution are DISMISSED for lack of subject matter jurisdiction.

Dated: 4 30 91

WILLIAM A. INGRAM
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. CV-89-20110-WAI

WALLACE E. LIN

Plaintiff,

v.

PRUDENTIAL-BACHE SECURITIES, INC., GEORGE BALL, KEVIN HOFFMAN, EUGENE STANSBERY, CARRINGTON CLARK, JR. and NEW YORK STOCK EXCHANGE, INC.

Defendants.

JUDGMENT

Pursuant to the Order of this court dated April 29, 1991 and the memorandum decision from the United States Court of Appeals for the Ninth Circuit dated March 20, 1991, IT IS HEREBY ORDERED,

ADJUDGED AND DECREED that the above captioned action is DISMISSED WITH PREJUDICE.

Dated: 4 30 91

WILLIAM A. INGRAM

United States District Judge